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No. 87-1398

IN THE

Supreme Court of the United States

October Term, 1987

DALE JOHNSON,
Petitioner,

vs.

ARLIE R. HELMUS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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I.

QUESTION PRESENTED

The Respondent will address the question presented by the Petitioner.

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BRIEF IN OPPOSITION

Respondent, Arlie Helmus, respectfully prays that a Writ of Certiorari to review the judgment of the Supreme Court of Ohio, entered in the above entitled cause on November 4, 1987, be denied.

STATUTE AND RULE INVOLVED

Ohio Revised Code §2313.42 can be found in the Appendix at A1; Rule 47 of Ohio Rules of Civil Procedure appears on page A3.

STATEMENT OF THE CASE

All legal proceedings in this case stem from an underlying automobile accident, tort claim, involving personal injuries allegedly sustained by the Petitioner who purported to be in a vehicle struck from behind by Respondent. The collision occurred on or about December 21, 1983 in Sandusky, Ohio. The matter proceeded, upon request of Petitioner, to be heard as a pre-recorded video-tape trial pursuant to Ohio Civil Rule 40.

Prior to the presentation of evidence, during the jury selection phase of the trial, two potential jurors were peremptorily challenged by counsel for Respondent; both of these individuals happened to be black. No objection was made by Petitioner's counsel to those challenges.

The primary defense relied upon by the Respondent during the trial was that the Petitioner was not an occupant of the automobile when the collision occurred.

The case proceeded to trial and in response to a special interrogatory, the jury found that Petitioner was not a passenger in the automobile when the collision occurred. A docket entry was thereafter put on rendering a judgment for Respondent.

A subsequent Motion for New Trial was filed by Petitioner, but was denied, with final judgment entered in favor of Respondent on February 12, 1986.

The case was then appealed to the Court of Appeals of Ohio for Erie County, Sixth District. By an opinion rendered June 6, 1987, the Court of Appeals affirmed the judgment of the trial court denying Petitioner any relief.

The Petitioner then attempted to get the Supreme Court of Ohio to accept jurisdiction of the case. By an entry dated November 4, 1987, the Supreme Court overruled Petitioner's motion to order the Court of Appeals of Erie County to certify its record and dismissed *sua sponte* Petitioner's claimed appeal as of right.

SUMMARY OF ARGUMENT

Ohio law does not require that a reason be given for exercising a peremptory challenge in a civil case. However, even if the Supreme Court of Ohio adopted a *Batson v. Kentucky,* 476 U.S. _____, 106 S. Ct. 1712, 90 L. Ed. 69 (1986) standard for peremptory challenges in civil cases, there were "neutral reasons" for challenging the two black veniremen in this case.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Ohio law provides two basic methods of challenging prospective jurors in a civil lawsuit prior to the impaneling or swearing in of a jury: the principal challenge, sometimes called the "for cause" challenge, and the peremptory challenge.

The "for cause" challenge is governed by the express requirements set forth in Ohio Revised Code §2313.42, and, if partiality can be shown as defined therein, such a prospective juror can be disqualified from service thereby.

In addition to the "for cause" challenge, Rule 47 of the Ohio Rules of Civil Procedure permits each party to peremptorily challenge three prospective jurors. However, the rules themselves do not provide guidelines as to the permissible scope of peremptory challenges other than giving blanket permission for that exercise. Such blanket authorization may certainly be construed to mean that *whatever* basis a party may have to challenge a prospective juror is properly within the scope of a Rule 47(B) challenge in a civil case.

The Supreme Court of Ohio's express pronouncement with respect to peremptory challenges further buttresses a party's broad based right to challenge for any or no reason. *Pavilonis v. Valentine*, 120 Ohio St. 154 (1929) involved an appeal as to the scope of *voir dire* inquiry in a civil case. In holding that *voir dire* must not be unduly restricted so as to permit parties to intelligently utilize peremptory challenges, the *Pavilonis* court succinctly stated:

> With reference to the peremptory challenge, it may be exercised for *no reason at all*; * * * (emphasis added).

Id. at 158 (*overruled on other grounds, Vega v. Evans,* 128 Ohio St. 535 (1934). The *Pavilonis* recognition of a peremptory challenge without exposition as to the reason underlying it is plainly the kind of challenge which was exercised by Respondent's counsel in the case at bar.

Petitioner's basis for the issuance of a writ is based on his assumption that *Batson v. Kentucky,* 476 U.S. ____, 106 S. Ct. 1712, 90 L. Ed. 69 (1986) is applicable to the case at bar. However a close reading of that decision indicates that the Court's opinion was specifically limited to "prosecutors peremptory challenges." Moreover as the Court in *Batson* stated ". . . a defendant has no right to a 'petit jury' composed in whole or in part of persons of his own race" *Strauder v. W. Va.,* 100 U.S. 303, 305, 25 L. Ed. 664 (1880).

There is a fundamental difference between criminal and civil proceedings. If the Supreme Court of the United States in *Batson* had intended its holding to apply to civil cases, they would have specifically said so. Petitioner fails to cite any precedent whatsoever, which supports the contention that *Batson* is equally applicable in both the civil and criminal venues.

Assuming, *arguendo,* that the *Batson* standard is applicable to civil cases Respondent had "neutral" explanations for excusing the two black veniremen. Mr. Brown admitted under oath that his wife had been represented by Attorney Kirk J. Delli Bovi, co-counsel of record on behalf of the Petitioner. Further, the second peremptorily challenged juror, Mrs. Everett, was treated by Drs. Skirball and Cuthbertson. Dr. Skirball treated the Petitioner for his alleged neck and back injury and his videotape deposition was subsequently presented to the jury. Clearly there were sound, "neutral" reasons for challenging both veniremen.

Finally, this case is distinguishable from *Batson* in that Petitioner failed to make any objection to the jury at the time of trial and is thus precluded from raising it for the first time on appeal. *State ex rel. Le Gere v. Carros,* 80 Ohio App. 65, 74 N.E.2d 779 (1946). *Simes v. Dayton X.R. Co.,* 25 Ohio Law Abs. 129, 36 N.E.2d 517 (1937).

CONCLUSION

In summation, the Petitioner has not demonstrated that the holding of *Batson* is applicable to civil cases such as the one at bar. Respondent was not required to justify the reasons two potential jurors were excluded, but had she been, if such a requirement did exist, there were valid "neutral" reasons for peremptorily challenging both prospective jurors.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

§2313.42 Causes for challenge of persons called as jurors; examination under oath.

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications.

The following are good causes for challenge to any person called as a juror:

(A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;

(B) That he has an interest in the cause;

(C) That he has an action pending between him and either party;

(D) That he formerly was a juror in the same cause;

(E) That he is the employer, employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

(F) That he is subpoenaed in good faith as a witness in the cause;

(G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;

(H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;

(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court.

OHIO RULES OF CIVIL PROCEDURE

RULE 47. JURORS

(A) Examination of Jurors. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry.

(B) Challenges to Jury. In addition to challenges for cause provided by law, each party peremptorily may challenge three jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."

Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the plaintiff. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties or both sides, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another juror shall be called who shall take the place of the juror excused and be sworn and examined as other jurors. The other party, if he has peremptory challenges remaining, shall be entitled to challenge any juror then seated on the panel.

(C) **Alternate Jurors.** The court may direct that no more than four jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, and two peremptory challenges if three or four alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed shall not be used against an alternate juror.